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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

AUDRIA HART ..... *Petitioner*

v.

UNITED STATES OF AMERICA ..... *Respondent*

CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION, BRIEF AND ARGUMENT FOR AUDRIA HART

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PETITION, BRIEF AND ARGUMENT FOR AUDRIA HART

Audria Hart prays that a Writ of Certiorari issue to review the judgment entered in this case on November 10, 1953, by the United States Circuit Court of Appeals for the Eighth Circuit.

OPINION BELOW

The District Court did not write an opinion. The opinion of the Circuit Court of Appeals is reported in 207 F. (2d) 813.

JURISDICTION

The judgment below was entered on November 10, 1953. The jurisdiction of this court is invoked under Title 28, USCA, Section 1254.

SUMMARY OF MATTER INVOLVED

Elizabeth F. Shoemaker in the years 1947, 1948 and 1949 was the principal stockholder in three corporations: Yellow Cab Building Co., Inc., The Yellow Cab Co., Inc., and the Checker Cab and Baggage Co. The last two named corporations during these years operated taxicabs in the City of Little Rock, Arkansas. The cab companies were operating at a loss during those years and, in order to continue their operation, Mrs. Shoemaker borrowed money periodically from Audria Hart, petitioner herein, her sister. Those loans totaled $59,900. As they were made, Mrs. Hart was given a receipt for the money, but was not given security for the loans until October, 1949, when an auditor was making an audit of the books of the cab companies and it was determined that the debt amounted to $59,900 and that she should be given security. On October 20, 1949, a note for this amount and a mortgage on the equipment was executed by the two cab companies. The note was also signed by Mrs. Shoemaker, who pledged her shares of stock in the cab companies and the Yellow Cab Building Co., Inc., to secure the payment of the note. The mortgage was duly recorded according to the laws of Arkansas on November 2, 1949.

No payments were made and on August 3, 1951, the petitioner herein filed an action on the note in the Chancery Court of Pulaski County, Arkansas, against Mrs. Shoemaker and the two cab companies, and prayed for foreclosure of the mortgage and pledge of stock and alleged insolvency of the defendants and prayed for the appointment of a receiver to take charge of all their assets. On that date a receiver was duly appointed by the State Court, qualified and took possession of all the mortgaged and pledged assets and has retained possession thereof

throughout the litigation, and now has custody of and is administering the estate.

On August 20, 1951, the United States of America intervened in the State Court proceedings setting up a tax liability owed to it by the defendants—$134,133.33 by Checker Cab and Baggage Co., $81,254.33 by Yellow Cab Co., and $67,112.73 by Mrs. Shoemaker—the validity and amounts of which had been previously determined by the Tax Court in a judgment entered on June 4, 1951, and alleging its lien to be prior to that of petitioner herein and alleging lack of consideration for the execution of the note. Pursuant to an amendment to the complaint, Yellow Cab Building Co., Inc., was made a defendant and the court appointed a receiver to take charge of its assets and they are now in the possession and custody of that receiver. In addition to filing an intervention in the foreclosure suit, in which petitioner was plaintiff in the State Court, the United States filed its claim in the pending receivership for the sum alleged by it to be due under the tax court judgment.

The case was set for trial in the Chancery Court for March 27, 1952, but on the day prior to the trial the United States of America dismissed its intervention, but not the claim for taxes above mentioned. The cause was tried as scheduled on March 27, 1952, and judgment was entered in favor of plaintiff, petitioner here, and a sale of the mortgaged and pledged property was ordered to be held on April 30, 1952, to satisfy the judgment.

On September 26, 1951, after intervening in the State Court receivership and foreclosure proceedings, the United States of America filed an action in the United States District Court for the Eastern District of Arkansas against Mrs. Shoemaker, Mrs. Hart and the Yellow Cab Building Co., Inc., seeking to enjoin issuance of additional shares

of capital stock of that company; and on April 25, 1952, it filed an amended complaint setting out further its tax claim against Mrs. Shoemaker, the Checker Cab and Baggage Co., and the Yellow Cab Co., Inc., and the pledge of the stock and execution of the mortgage hereinabove mentioned, praying that it have judgment against the two companies and Mrs. Shoemaker, and that the judgment be declared a prior lien to that of Mrs. Hart on all the assets of the defendants; that the note and mortgage be cancelled; that a receiver be appointed by the United States District Court to take charge of all the assets of the defendant companies and Mrs. Shoemaker (which were already being administered in the State Court in the receivership there) and that the property of the defendants be sold by order of the District Court. Mrs. Hart answered the amended complaint denying the jurisdiction of the court; admitting the execution of the note, mortgage and pledge of stock; admitting insolvency of the defendant companies; setting out that their assets were under the control and in the possession of the receiver appointed by the Pulaski County, Arkansas Chancery Court; pleading that the State Court had exclusive jurisdiction; that the State Court had already rendered judgment in her favor and had found that her note was supported by an adequate and full consideration in money or monies worth bringing the case within the rule of *res judicata*; that the United States, having voluntarily submitted itself to the jurisdiction of the State Court asking for the same relief now sought in the District Court, had conferred exclusive jurisdiction of the subject matter and of the *res* on the State Court.

Also, on April 25, 1952, the United States of America filed a separate suit in the District Court against Mrs. Shoemaker, Mrs. Hart and the Commissioner of the State Court, who had been duly appointed by said Court to sell

the property to satisfy the State Court judgment, seeking to enjoin the defendants from holding the sale in accordance with the State Court judgment. Mrs. Hart answered pleading lack of jurisdiction of the District Court. A temporary injunction was granted and in deference thereto the sale was not held.

The District Court actions were consolidated for trial in which all facts were stipulated except the question of consideration for the note, mortgage and pledge, and testimony was taken on that issue alone, which testimony petitioner contends shows clearly and overwhelmingly that there was consideration for the execution of the note, mortgage and pledge. The District Court found that the note, mortgage and stock pledge were fraudulent and without consideration and enjoined the sale previously scheduled in the State Court.

Petitioner has contended every step throughout the litigation that the proceedings are *in rem* or *quasi in rem;* and that the United States District Court had no jurisdiction to grant the United States of America any priority in distribution of the *res* which had been throughout the proceedings in the jurisdiction and exclusive control of the State Court. Petitioner has further contended throughout that when the United States of America first chose to litigate the issue of consideration in the State Court it was bound to proceed in that Court.

(See statement of facts in Circuit Court of Appeals opinion and the Record therein.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In affirming the holding of the District Court granting priority to the United States of America in distribution of the *res* which was in *custodia legis* of the State Court receivership;

2. In rendering a decision contrary to the decision of this Court in *Pufahl* v. *Estate of Parks*, 299 U.S. 217.

3. In rendering a decision in conflict with the decision of another Circuit Court of Appeals in *Dept. of Financial Institutions* v. *Mercantile-Commerce Bank & Trust Co.*, 92 F. (2d) 639.

4. In basing its holding herein on the decision of this Court in *Commonwealth Trust Co. of Pittsburgh* v. *Bradford*, 297 U.S. 613, and in failing to distinguish between a situation as in that case where property was merely in the hands of a trustee appointed by a State Court, from a situation like the case at bar where the action is *in rem* and the property is in *custodia legis* of a State Court receivership; and thus, by its decision bringing about a conflict between the State Court, where petitioner herein obtained a valid judgment directing foreclosure and sale of the *res*, and the United States District Court which has held in effect that petitioner cannot enforce her judgment in accordance with its terms.

5. In holding that the United States of America was not bound to proceed in the State Court when it chose voluntarily by intervention, duly granted it,

to litigate the same question there as it later elected to litigate in the District Court; and in holding that the judgment first entered in the State Court was not *res judicata.*

6. In affirming the findings of fact of the District Court that there was no consideration for the note, mortgage and pledge (without setting out the evidence thereon) which findings of fact were clearly erroneous and not supported by any substantial evidence whatever.

CONCLUSION

Since the questions presented are of general importance, and since the decision below conflicts with other decisions in several respects, and the judgment of one court has been checkmated by the later judgment in the other court, resulting in an intolerable, unseemly and disastrous conflict between the two judicial systems, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted

E. M. Arnold

Leffel Gentry

Solicitors for Petitioner

Dated: 18th day of January, 1954.

VERIFICATION

STATE OF ARKANSAS)
COUNTY OF PULASKI))ss

I, Leffel Gentry, state that I am one of the Solicitors for the Petitioner herein, and that the facts and matters stated in the foregoing Petition are true and correct, as I verily believe.

Leffel Gentry

Subscribed and sworn to before me, a Notary Public within the County and State aforesaid, this the 18th day of January, 1954.

Rex J. Thompson
Notary Public

My Commission Expires:
May 4, 1957

BRIEF AND ARGUMENT

I

Court below erred in affirming District Court holding granting priority to the United States in distribution of the res, which was in custodia legis of the State Court receivership.

No fact pertaining to the question of jurisdiction of the United States District Court for the Eastern District of Arkansas is in dispute in any way. All the facts were stipulated in the District Court trial except the question of consideration for the note, mortgage and pledge executed to Mrs. Hart (R.30-33). On the 4th day of June, 1951, the Tax Court of the United States rendered a judgment in favor of the United States against Checker Cab and Baggage Co., in the amount of $134,113.33, against Yellow Cab Co., in the amount of $81,254.33, and against Elizabeth Shoemaker in the amount of $67,112.73 (R.31). Thus, "the validity and amount" of the claim of the the United States against these parties had been adjudicated by a Court of competent jurisdiction prior to the beginning of this litigation. That is all that the United States District Court properly could have done in this case, since the *res* was already in the possession of and being administered in the State Court. This action was not necessary to adjudicate the validity and amount of the claim of the United States. The real purpose then of the action filed by the United States in the District Court was something else—to determine priority of distribution of the *res* in the possession of the State Court. That the District Court could not properly do. The opinion of the Circuit Court of Appeals recognizes that and quoted the following from the decision of this court in the *Pufahl* v. *Estate of Parks*, 299 U.S. 217:

> "the marshalling of the (receiver's) claim with others, its priority, if any, in distribution, and all similar questions, are for the probate court upon presentation to it of the judgment or decree of the federal court" (R.72-73).

To the extent that the District Court properly had jurisdiction under the holding of this court in the Pufahl case, *supra*, the District Court action was wholly unnecessary. The paragraphs in the prayer of the complaint numbered 1 to 12 (R.8-9) and the other suit brought by the United States (R.16-17), which actions were consolidated, show that the relief sought went far beyond any conceivable jurisdiction of the District Court. It is true that not all of that relief was granted and that the Circuit Court of Appeals opinion reversed the action of the District Court in granting some of the relief sought, yet the Circuit Court of Appeals opinion does affirm erroneously the holding of the District Court granting the United States priority over Audria Hart in distribution of the *res* rightfully in the possession of the State Court. To that extent the Circuit Court of Appeals opinion is directly in conflict with the opinion of this court in the Pufahl case, *supra*.

Long before this action was filed, the United States had intervened in the State Court seeking priority in distribution over Mrs. Hart (R.32), and that is the only forum in which it could have obtained such priority. The United States, by its abortive attempt to disturb the *res*, and in obtaining a temporary injunction from the District Court, disturbed the orderly processes of the State Court and prevented, without proper jurisdiction, the sale of the assets. There was and can be no showing that it could not have properly presented for decision the question of priority of distribution in the State Court where it first attempted to claim priority, and, of course, if it had not been satisfied with the holding of the State Court, it would

have had a right to appeal to the Supreme Court of Arkansas and finally the right to ask for review of the decision of that court by this court. There has never been any good reason for the District Court to assume jurisdiction of this case, and it is earnestly insisted that the Circuit Court of Appeals erred in affirming the ruling of the District Court to the extent of granting a priority to the United States over Audria Hart in the *res* rightfully in the possession of the State Court. This is a most serious question of intolerable, unseemly and disastrous conflict between the courts of our two judicial systems, and Mrs. Hart's petition herein for a Writ of Certiorari should be granted in the interest of harmony in the dual systems. It is, of course, conceded by petitioner that if the validity and amount of the claim of the United States had not been previously adjudicated by the Tax Court, that question only could have been adjudicated in the District Court in this action. That, however, is the full extent of the jurisdiction of the District Court, and the opinion below, being out of harmony with the rulings of this court, should not be allowed to stand.

II

The Decision of the Lower Court is Contrary to the Decision of This Court in Pufahl v. *Estate of Parks*

That the opinion of the Circuit Court of Appeals in this case is in conflict with the decision of this court in *Pufahl* v. *Estate of Parks*, 299 U.S. 217, there can be no doubt. The only real purpose of the District Court action was to seek and obtain priority over Mrs. Hart in the distribution of the *res* in possession of the State Court. While other relief, including actual interference with the processes of the State Court, and taking the *res* away from the State Court, was sought and some of it granted, the

District Court holding was affirmed only to the extent of giving the United States priority in distribution over Mrs. Hart. The Circuit Court in its opinion said:

> "The right of the United States to maintain the action in the federal court to establish its tax claim *and have adjudicated the priority of its tax lien against the claim of a prior lien by Mrs. Hart is clear*" (emphasis supplied) (R.74).

The proper rule and holding of this court in the Pufahl case was called to the attention of the Circuit Court as follows:

> "Where, as here, a *res* has come into the possession and under the control of a state court, one having a right to go into the federal court, either by reason of diversity of citizenship, or because he is a federal officer, cannot obtain a judgment or decree entitling him to interfere with the administration of the *res* by the court having its possession. While he may not be denied his right to prosecute an action to judgment or a suit to final decree in the federal court, such judgment or decree can do no more than adjudicate the validity and amount of his claim. *The marshalling of that claim with others, its priority, if any, in distribution, and all similar questions, are for the probate court upon presentation to it of the judgment or decree of the federal court.* Thus, although a receiver should resort to the United States District Court, he would need to present, in a probate court, any judgment obtained, if he desired payment from the assets under the control of the latter" (emphasis supplied).

The attempted distinction in the lower court opinion is not tenable, and its opinion is in direct conflict with the opinion of this court in the Pufahl case and many others.

III

The Opinion of the Lower Court is in Conflict with a Decision of the Seventh Circuit Court of Appeals

It is admitted in this case by stipulation (R.32) that after the State Court obtained possession of the *res*, the United States of America intervened in that court setting up priority of its tax lien over the plaintiff's claim in the suit, and alleging lack of consideration for the note executed. The day before the trial in the State Court it withdrew its intervention in that case. Judgment was duly rendered in favor of Mrs. Hart, petitioner here, and a sale was ordered under the mortgage and pledge to satisfy the judgment based on the note. The amended complaint in the District Court and the separate suit to enjoin the State Court sale were filed after that judgment was entered in the State Court. The United States, in the fashion of a hit and run litigant, was obviously attempting to evade a trial on the merits in the court that was in possession of the very *res* which it was seeking to gain control of and a priority in. It knew the case was set for trial for the day after it withdrew its intervention. It was seeking all the relief from that court that it later sought in the District Court.

Petitioner contended in both the District Court and Circuit Court that the United States, having voluntarily submitted to the jurisdiction of the State Court, and having invoked the jurisdiction of that court on the issue of consideration for the note, mortgage and pledge, was bound to proceed in that forum and waived its right to invoke the jurisdiction of the Federal District Court by so doing. A very similar situation was presented in *Dept. of F. I.* v. *Mercantile-Commerce Bank & Trust Co.*, 92 F.

(2d) 639, where the position of the parties, as taken from the opinion of the Seventh Circuit Court, was as follows:

> "Appellants contend that the *res* of the bank's property, including the bank building, fixtures and equipment mortgaged, being in *custodia legis* in the state court, it was beyond the jurisdiction of the District Court to enter a decree of foreclosure and sale; that the court should have dismissed the bill; that by virtue of the liquidation proceedings, cause No. 2342 in the superior court of Vanderburgh County, Indiana, exclusive jurisdiction was vested in that court over the *res* and that no other court might interfere with its custody and jurisdiction; that, further, and irrespective of any right in the trustees, appellees, to prosecute their suit for foreclosure in a federal court because of diversity of citizenship, *such right has been waived by their action in filing and proving their claim for the mortgage debt in the superior court*" (emphasis supplied).
>
> "Appellees contend that the proceeding pending in the Indiana Court is administrative in character; that custody and jurisdiction of the property are not in the court but rather in the executive department of the state government; that consequently, the doctrine of comity requiring the surrender of jurisdiction to a court of co-ordinate jurisdiction first procuring the custody of the *res* does not apply; that diversity of citizenship existing, appellees have a right to their remedy in a federal court, which cannot be taken away by state statute; that the filing of their claim in the liquidation proceeding and praying for relief therein was no waiver of this right; that the District Court had jurisdiction and that the decree should be affirmed * * *."

The Circuit Court of Appeals in that case, followed the *Pufahl* case, *supra*, quoted from it and said:

"We conclude that at the time of the commencement of appellee's bill, the assets of the bank had been segregated in a proceedings *in rem* in the Superior Court of Indiana; *that appellees recognized the jurisdiction of that court and are now estopped to assert their right to sue in the federal court;* that this jurisdiction thus recognized is an exclusive one *in rem*; that appellee's remedy must be sought in the state court, and that the bill in the District Court should have been dismissed for want of jurisdiction" (emphasis supplied).

"* * * The trustees asked the state court, just as they asked the federal court, to adjudge their lien prior upon both property and rents and to fix the amount due thereunder. These actions bring it within the language of *Pufahl* v. *Estate of Parks, supra.*"

The opinion of the Eighth Circuit herein clearly shows, as does the Record, that the United States first sought to try the question of consideration for the note, mortgage and pledge in the State Court and later asked the United States District Court to try that issue. On these established facts, petitioner respectfully asserts that the opinion promulgated herein by the Eighth Circuit Court is in direct conflict with the opinion of the Seventh Circuit.

Further, the United States, on November 2, 1951, filed and proved its Claim in the State Court receivership in a separate instrument from the court intervention (R.28) and claimed "that said debt has priority and must be paid in full in advance of distribution to creditors". That Claim and demand for priority was before the State Court and pending for the purpose of a ruling thereon when Mrs. Hart obtained her judgment on March 27, 1952, as shown by the certificate of the Clerk of the State Court (R.29). If it had withdrawn this Claim and demand for priority before the State Court trial on the merits, the

situation might be different. Certainly if the State Court had granted the demand for priority when it tried the merits of the action pending there, the United States would have taken advantage of that ruling and the District Court action involved here would have never been filed.

IV

The Court erred in basing its holding herein on the decision of this Court in Commonwealth Trust Company of Pittsburgh v. *Bradford,* 297 U.S. 613, *and in failing to distinguish between a situation as in that case, where property was merely in the hands of a trustee appointed by a State Court, from a situation like the case at bar where the action is in rem and the property is in custodia legis of a State Court receivership. Thus, by its decision, it brought about a conflict between the State Court, where petitioner herein obtained a valid judgment directing foreclosure of the res, and the United States District Court which has held in effect that petitioner can not enforce her judgment in accordance with its terms.*

In its opinion, the Court of Appeals attempted to neutralize the holding in the Pufahl case by leaning on certain verbiage contained in the Commonwealth Trust case, *supra. The facts in that case are in no wise similar to the facts in the Pufahl case, nor those in the case at bar.* In that case, the bank was a trustee of certain mortgage proceeds and the Comptroller of the Currency appointed a receiver for the bank. The receiver did not care to administer the trust, and, in accordance with Pennsylvania Statutes, the Orphans Court appointed a trustee in succession. The trustee in succession refused the receiver the right to share in the proceeds of the trust, and he brought an action in the District Court to have his rights in the trust adjudicated.

It was contended that the *res* was in possession of a State Court and, hence, the United States District Court could not interfere with such. This court held that the trustee appointed by the Orphans Court was not the same as a State Court receiver, and his possession of the property did not constitute "*in custodia legis*" and that is all the court held.

The Eighth Circuit Court of Appeals in the opinion in this case misinterpreted the facts in the Commonwealth Trust case, when it said:

> "* * * In the latter case (Commonwealth) one of the objects of the action in the Federal Court was to establish a claim and its priority of payment out of funds in the hands of a receiver of a state court * * *" (R.75).

As we previously pointed out, the trustee in the case was not a receiver. He merely held the property in a fiduciary capacity. In no way was the property in the custody of the State Court as it was in the case at bar. As this Court said in the Commonwealth case:

> "* * * Property in its (the trustee's) possession is not in *custodia legis* as in the case of receivers * * *."

This very language was used by the writer of the opinion in the Eighth Circuit (R.75) to support the theory that suits could be brought in the United States Courts to establish priority in a *res* in possession of a State Court receiver, even though the nature of the action in the United States District Court sought to hamper the State Court administration of the *res*.

V

The United States was bound to proceed in the State Court when it voluntarily intervened, and could not thereafter try the same issue in the District Court.

It is established in this case, by stipulation, that the United States had a valid and subsisting Tax Court judgment in which the validity and amount of its claim had been adjudicated (R.31), and that after the State Court obtained jurisdiction and possession of the *res* in Mrs. Hart's foreclosure action, the United States intervened in the State Court seeking to have its alleged lien declared prior to that of Mrs. Hart (R.32). The United States had a perfect right to do that, and that was the proper forum to litigate that question. After this issue had been joined in the State Court litigation and the cause had been set for trial for March 27, 1952, the United States dismissed the intervention on March 26, and at the trial the plaintiff (Mrs. Hart) prevailed in her suit. The United States knew when it withdrew the day before that trial what the issues were, and that Mrs. Hart might be given a valid judgment on the note sued on and a decree of foreclosure against the mortgaged and pledged property. Knowing these facts, it stood by and let that judgment be taken, at which time the court found that her claim was supported by an adequate consideration in money or monies worth.

It was not until April 25, 1952, that it filed an amended complaint in an action previously filed by it to enjoin issuance of additional capital stock and asked that the two taxicab companies be then made parties defendant, prayed for the appointment of a receiver and much other relief (R.4), and also filed a separate suit to enjoin the State Court officials and the plaintiff from selling the pledged and mortgaged property pursuant to the State Court judgment. If it had not been for the action taken by the Dis-

trict Court in granting a temporary injunction, which temporary injunction was wrongfully granted, as has been already held by the Circuit Court of Appeals, the sale would have been held as scheduled in the State Court. There was no substantial basis for any of the relief prayed in the District Court, and while most of it was not granted, the issuance of the improper injunction, to which the State Court deferred, did accomplish to a substantial extent the real purpose of that suit, and thus held the matter of sale in abeyance until the judgment complained of herein, which violates all rules of comity, could be entered.

It cannot be denied that the action filed by the United States in the amended complaint on April 25, 1952 (R.4), was an action *in rem.* The relief prayed (R.8-9) establishes that fact. Of course, the State Court action, in which the United States had previously intervened, was one *in rem.* This Court in *Flanders* v. *Coleman,* 250 U.S. 223, clearly held that the question of jurisdiction must be determined upon consideration of the allegations and grounds, upon which federal jurisdiction is invoked, and not upon conclusion on the merits of the action, when it said:

> "Whether the District Court has jurisdiction to grant any relief must be determined upon a consideration of the allegations of the bill and the amendment thereto. If there be enough of substance in them to require the court to hear and determine the cause, then jurisdiction should have been entertained. * * * As this Court has not infrequently said, jurisdiction must be determined not upon the conclusion on the merits of the action, but upon consideration of the grounds upon which federal jurisdiction is invoked."

Since the relief sought by the United States in both the State Court and the District Court, was the same, and since the United States first invoked the jurisdiction of

the State Court which had possession of the RES, *your petitioner contends that by so doing it fixed the forum, waived its right to proceed in the District Court, and is estopped to assert its right to sue in the Federal District Court.* This Court in the Pufahl case, *supra,* said:

> "The receiver may, as petitioner elected to do, prosecute his claim in a state court. If he does, at least in the absence of congressional declaration to the contrary, the litigation will be covered by the common and statutory law of the state. * * *"
>
> "The petitioner, having elected to prove his claim in the appropriate state court, is bound by the laws of Illinois as to the enforcement of such claims."

The Seventh Circuit Court of Appeals in *Dept. of F. I.* v. *Mercantile-Commerce Bank & Trust Co.*, 92 F. (2d) 639, followed the Pufahl case, quoted from it and said:

> "We conclude that at the time of the commencement of appellee's bill, the assets of the bank had been segregated in a proceedings *in rem* in the Superior Court of Indiana; *that appellees recognized the jurisdiction of that court and are now estopped to assert their right to sue in the federal court*; that this jurisdiction thus recognized is an exclusive one *in rem;* that appellee's remedy must be sought in the state court and that the bill in the District Court should have been dismissed for want of jurisdiction (emphasis supplied).
>
> "* * * The trustees asked the state court, just as they asked the federal court, to adjudge their lien prior upon both property and rents and to fix the amount due thereunder. These actions bring it within the language of *Pufahl* v. *Estate of Parks," supra.*

The facts here bring this case within the above rule, and the Eighth Circuit Court of Appeals was in error in

holding that the United States could litigate these issues in the District Court after first having invoked the jurisdiction of the State Court on the same issues. It is true that the United States could have filed an action under the provisions of 26 U.S.C. 3678 and 28 U.S.C. 1345 if it had acted before the State Court obtained jurisdiction of the *res,* and if it had not previously sought the same relief in the State Court, which was in possession of the *res.*

VI

The Findings of Fact Made by the Trial Court Were Clearly Erroneous and Not Supported by Any Substantial Evidence

Petitioner is fully aware of the "two-court" rule and of her burden below and here to show that the District Court's findings of fact were clearly erroneous. This Court in *U. S.* v. *Gypsum Co.,* 333 U. S. 364, said:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."

Petitioner most earnestly contends that a mistake has been committed here, and that a mere casual review of the testimony shows that the findings of fact were not supported by any substantial evidence whatever. Since the lower court's opinion does not review to any extent the evidence, it is necessary to refer briefly to the Record here. The United States, plaintiff in the action, called two witnesses who were employed as Special Agents by the Treasury Department, and who made detailed investigations over a long period of years of the affairs of some of the defendants. They testified to the manner and methods of bookkeeping, and that there was deposited, in one bank account, the sum of $291,000, and that the United

States received $200,000 of the withdrawals from that account for taxes; that only about twenty-five per cent of the revenue of the taxicab companies was deposited in the bank; that operating bills, salaries, purchases of equipment and driver's commissions were paid in cash, and that the bank account was used almost exclusively for the payment of taxes. The conclusion could be drawn from the testimony that the cab companies were insolvent, taking into consideration the alleged tax liability (R.33-37). This litigation involves the adequacy of the consideration for the $59,900 note made to Mrs. Hart and the mortgage and pledge given to secure it. One of the witnesses called by the United States testified on cross examination (R.35-36) that in his investigation he was confronted with the note and mortgage, and that he endeavored to trace the amount of that consideration from Mrs. Hart into the corporation account, and was able to trace $54,400.

On behalf of Mrs. Hart, it was shown by the testimony of the president of a local Building and Loan Association, that he lent $12,000 to Mrs. Hart for the purpose of her lending it to the cab companies (R.38), and another witness (R.38) testified concerning sale of real estate to Mrs. Hart in the year 1943 and the payment therefor by her in currency. The former attorney for the cab companies testified (R.39) about the negotiations whereby Mrs. Hart borrowed money on her home to lend the cab companies and previous loans made by her to the companies. Mrs. Hart's testimony (R.40-43) is clear and unequivocal as to the various loans, and she produced receipts given her for this money and bank ledger sheets showing the deposits thereof to the cab companies' bank accounts to corroborate her testimony. These original receipts and original bank statements were, by order of the District Court, transmitted to the Circuit Court of Appeals for its examination.

While petitioner realizes that it is ordinarily not the province of this court to review or explore evidence on which findings of fact were made, it is urged that this is an unusual situation, and that the evidence, conclusive as it is, is overwhelming to show adequate consideration for the note, mortgage and pledge; that a grievous mistake has been made, and that this Court should grant certiorari to review the findings of fact. It is earnestly insisted that there was no substantial evidence whatever to support the trial court's findings, and since the Circuit Court failed to set out the evidence on the question of consideration, it is respectfully urged that the Court review the Record citations mentioned herein.

Respectfully submitted

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